

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**





# NO. 77-4198

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## United States Court of Appeals FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

and

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION  
OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON  
WORKERS, AFL-CIO,

*Intervenor,*

v.

INDEPENDENT ASSOCIATION OF STEEL  
FABRICATORS, INC., ET AL.,

*Respondents,*

and

LOCAL 810, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA, AFL-CIO,

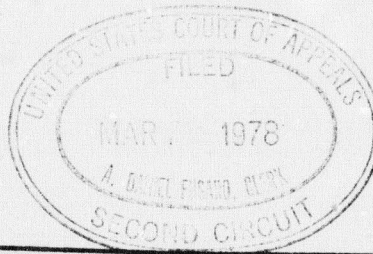
*Intervenor,*

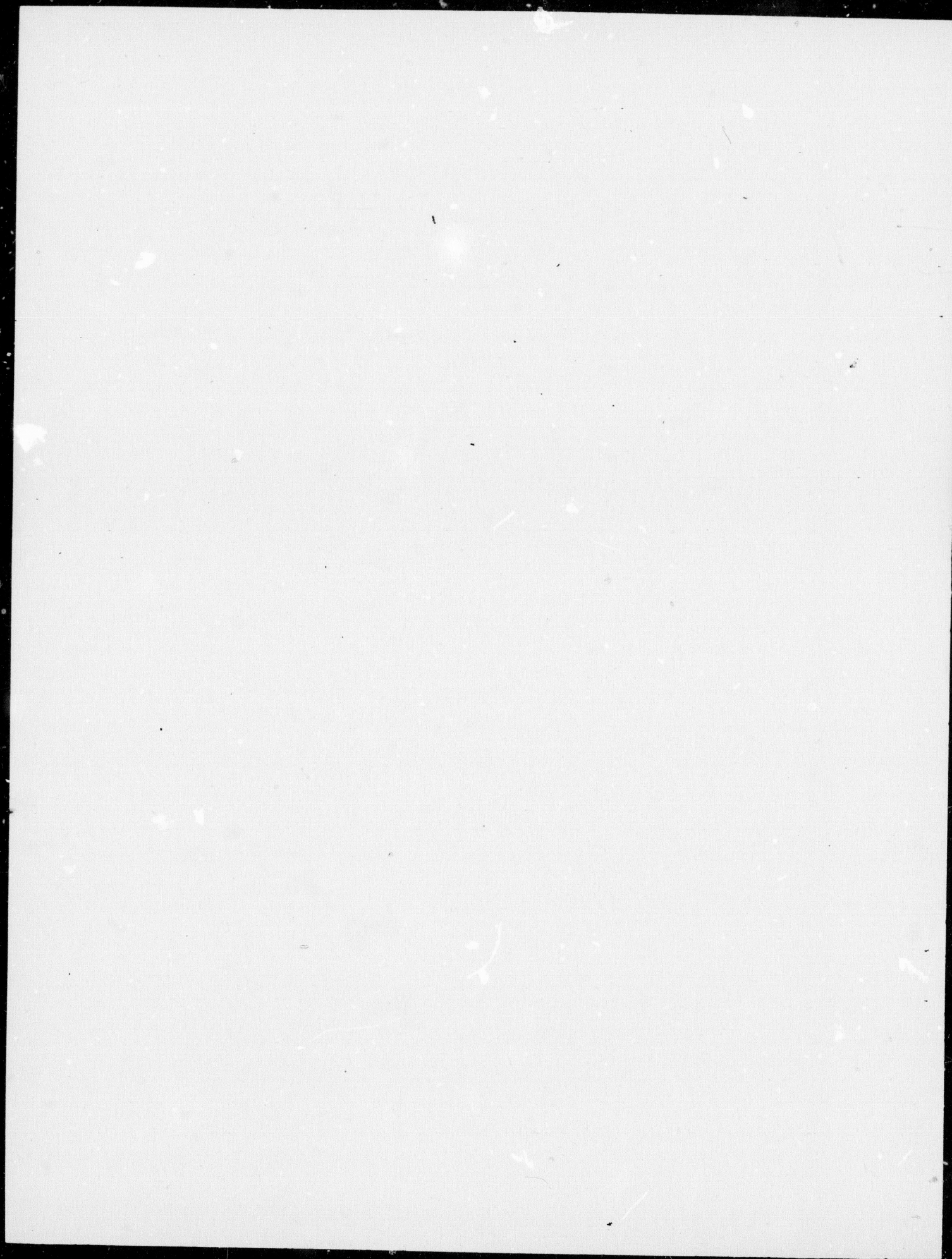
ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 77-4198

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

SHOPMEN'S LOCAL UNION NO. 455,  
IABSOIR, AFL-CIO,

Intervenor,

v.

INDEPENDENT ASSOCIATION OF STEEL  
FABRICATORS, INC., et al.

Respondents,

and

LOCAL 810, IBTCWHA,

Intervenor,

---

BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Association, Greenpoint Ornamental, Long Island Steel, Master Iron Craft, Paxton Metalcraft, Roma Iron, Trojan Steel and Zaffino and Sons rendered unlawful assistance and support to Local 810, in violation of Section 8(a)(1), (2) and (5) of the Act, by soliciting employees to abandon Local 455 and support and join Local 810.



2. Whether substantial evidence on the record considered as a whole supports the Board's finding that Cervanka and Sons, Greenpoint Ornamental, Koenig Iron, Long Island Steel, Master Iron Craft, Melto Metal, Mohawk Steel, Paxton Metalcraft and Roman Iron violated Section 8(a)(1), (2), (3) and (5) of the Act by recognizing Local 810 as representative of their employees, and by entering into a union security collective bargaining agreement with Local 810 covering those employees at a time when they were obligated to recognize and bargain with Local 455 as representative of their employees.

3. Whether substantial evidence on the record considered as a whole supports the Board's finding that Greenpoint Ornamental, Long Island Steel, Rona Iron, Trojan Steel and Zaffino and Sons violated Section 8(a)(1) of the Act by threatening employees with discharge and other reprisals to induce them to support Local 810 and abandon Local 455, and by threatening to close their plants for that same purpose.

4. Whether substantial evidence on the record considered as a whole supports the Board's finding that the Association and the employers violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain in good faith with Local 455 as representative of the employees in the appropriate multi-employer unit.

5. Whether substantial evidence on the record considered as a whole supports the Board's finding that the Association and the employers, other than Trojan Steel and Heuser Iron, violated Section 8(a)(5) and (1) of the Act by refusing to sign the collective bargaining agreement, dated January 23, 1976, entered into between Local 455 and other employer-members of the Association.

6. Whether substantial evidence on the record considered as a whole supports the Board's finding that Greenpoint Ornamental and Long Island Steel violated Section 8(a)(3) and (1) of the Act by discharging employees in reprisal for their continued support of Local 455, and that the Association and the employers, other than Trojan Steel and Heuser Iron, violated those sections by failing and refusing to reinstate their striking employees upon their unconditional application for reinstatement.

#### STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Section 151, et seq.), for enforcement of an order issued August 11, 1977, against



the Independent Association of Steel Fabricators, Inc. (herein the "Association") an association of employers, and 18 of its employer-members.<sup>1/</sup>

The Board's decision by Members Jenkins, Penello and Walther is reported at 231 NLRB No. 31 (A. 2197-2198).<sup>2/</sup> This Court has jurisdiction, the unfair labor practices having occurred in New York City, New York, and environs, where the various employers are engaged in the iron and steel fabrication and construction business (A. 2089).

#### I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Association and its employer-members violated Section 8(a)(1), (2) and (5) of the Act by engaging in a pattern of action to assist Sheet Metal,

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1/ The employer-members named as respondents are as follows:

|                       |                   |
|-----------------------|-------------------|
| Achilles Construction | Melto Metal       |
| Cervanka and Sons     | Mohawk Steel      |
| Greenpoint Ornamental | Paxton Metalcraft |
| Heuser Iron           | Peele Company     |
| Ikenon Iron           | Roma Iron         |
| Koenig Iron           | Roman Iron        |
| Kuno Steel            | Spigner and Sons  |
| Long Island Steel     | Trojan Steel      |
| Master Iron Craft     | Zaffino and Sons  |

Court enforcement is not sought of that portion of the order issued against Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (herein "Local 455"), since Local 455 has voluntarily complied with its provisions.

2/ Record references are to pages of the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Alloys and Hardware Fabricators and Warehousemen, Local 810, International Brotherhood of Teamsters (herein "Local 810") to supplant Local 455 as representative of their employees, the Board also found that certain of the employers violated Section 8(a)(1), (2), (3) and (5) by executing union security contracts with Local 810 covering their employees at a time when they were obligated to recognize Local 455.

The Board further found that the attempted withdrawal from the multi-employer Association by certain of the employers was untimely and not otherwise justified by unusual circumstances, wherefore their subsequent refusal to recognize and bargain with Local 455 was violative of Section 8(a)(5) and (1), and that their refusal to sign and implement a contract subsequently negotiated between Local 455 and certain remaining members of the Association was violative of those same sections.

Finally, the Board found that the economic strike commenced by Local 455 was converted to an unfair labor practice strike and that the refusal of the employers to reinstate the employees upon their unconditional application was violative of Section 8(a)(3) and (1) of the Act.

The evidence underlying the Board's findings is detailed below.



A. The Industry Bargaining Pattern  
and the Formation of the  
Independent Association

For a substantial period prior to the events giving rise to this proceeding, the employers in the iron and steel construction and fabrication industry in New York City whose employees were represented by Local 455, had bargained with that union either independently or as members of a multi-employer association named Allied Building Metal Industries, Inc. (herein "Allied") (A. 2090; 165-167, 714).<sup>3/</sup> Negotiations were conducted concurrently with the independent employers and Allied on the basis of stipulations prepared by Local 455 setting forth the changes sought in the terms of the most recent contracts (A. 168-171, 183). In the stipulation provided Allied, the references were to the prior Allied contract, and in the case of the independent employers, to the "standard independent contract" used by the union in negotiating with those employers (A. 2090; 182-184). The stipulation submitted to the independent employers usually specified the wages and fringe benefits for the first year only, with those for the second and third years to be the same as those negotiated with Allied (A. 174, 183, 209-211, 971A-2A). On the matter of

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<sup>3/</sup> Local 455 also represented employees of producers of various metal and wire products who bargained through the Wire Workers Association (A. 206).

contributions to the jointly administered funds (pension, vacation, etc.) the stipulations with the independent employers provided that the amounts reached in negotiation with Allied would be adopted. Allied appointed the employer trustees, and its contract historically set the pattern for fund contributions (A. 2128; 173, 209, 385-386). Modifications made in the contracts signed with a particular employer to meet his particular requirements were applicable only to that employer and did not become part of the basic contract (A. 2136).

The wage and fringe benefit provisions, as well as the fund contributions, were essentially the same for all employers under this concurrent bargaining practice, but over a series of successive contract negotiations some 56 differences had developed between the basic provisions of the Allied contract and those of the standard independent contract. Those differences, generally viewed as beneficial to the Allied employers, concerned such matters as contract coverage of plant clericals, contract coverage on change of location, and time and one-half for Friday overtime rather than double time (A. 2090, 2094; 174-177).

In early 1975, a number of employers then having standard independent contracts with Local 455 - although some had during prior contract terms been members of Allied - formed



the Independent Association (A. 2090; 1649, 1648). The Association was formed as a trade association, with one of its principal functions the conduct of negotiations with Local 455 and other unions on a multi-employer basis (A. 2090). The Association retained as its labor relations advisor attorney Herman Brickman, who was at the time the arbitrator designated in contracts between Local 810 and various employers in the industry (A. 2100; 987). Following receipt by the individual employer-members of letters from Local 455 advising them that their current contracts would terminate June 30, 1975, and requesting negotiations for a new contract, (A. 2093; 72-73, 2202) Irving Spigner, president of the Association, sent a letter to William Colavito, president of Local 455, advising him that the 25 companies listed in the letter were members of the Association and had authorized it to acknowledge the termination notices (A. 2093; 76, 2203). By letter of May 8, Local 455 informed the Association that contract proposals were being prepared and requested an authorization from each of the employers authorizing the Association to bargain on its behalf (A. 76, 2204). Under

date of June 10, the Association furnished Local 455 with authorizations from the following 32 employers (A. 2093; 78, 2210-2214):<sup>4/</sup>

Achilles Construction  
Atwater Iron  
Balfour and Company  
Bay Iron  
Brakewell Steel  
Carlin Manufacturing  
Cervanka and Sons  
Charla Iron  
Dextra Industries  
Esco Iron  
Greenpoint Ornamental  
Heuser Iron  
Ikenson Iron  
Island Tank  
Koenig Iron  
Kuno Steel

Long Island Steel  
Master Iron Craft  
Melto Metal  
Mohawk Steel  
Naiztat Iron  
North Shore Iron  
Paxton Metalcraft  
Peele Company  
Penner Company  
Roma Iron  
Roman Iron  
Spigner and Sons  
Trojan Steel  
Weatherguard Service  
Wortman Iron  
Zaffino and Sons

Four bargaining sessions were held between Local 455 and the Association during June 1975 (A. 2093, 84). The committee negotiating on behalf of the Association consisted of Association President Spigner, Edward Peele of Peele Company, Murray Scheiner of Master Iron Craft, Lawrence Uydess of Bay Iron and Daniel Doyle of Brakewell Steel (A. 2134; 1883, 80).

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<sup>4/</sup> Local 455 objected to the inclusion on the list of Balfour and Company, Esco Iron, Penner Company and Weatherguard Services, on grounds that it had already commenced negotiations with those employers on an individual basis (A. 2093; 81-86, 2206-2209). Local 455 did not, however, object to Walter Balfour of Balfour and Company serving on the negotiating committee of the Independent Association (A. 2094; 199, 1885). Balfour and Company, Esco Iron and Penner and Company subsequently signed standard independent agreements with Local 455 (A. 2098; 335, 337). Weatherguard Services went out of business and was absorbed by an employer already under contract to Local 455 (A. 337).



At or prior to the first of these meetings on June 16, Local 455 provided the Association with a bargaining proposal complete except for a precise figure on wages and fund contributions (A. 2130, 953A, 2239-2266). At that first meeting, as well as the subsequent ones, however, the exclusive topic of discussion was the interest of the Association in obtaining the advantages of the Allied contract provisions on the 50-odd differences. In response to the Association demand that the differences be granted en bloc, Local 455 President Colavito sought to discuss them individually to assess their applicability to the operations of the Association members (A. 2094, 2130; 179-183, 199-203, 708-709, 1886-1891). On June 30, the expiration date of the individual company contracts, Calovito advised the Association that the Union was seeking a 15 percent wage increase and a 5 percent fund increase from Allied (A. 2095; 964A, 2043). At that same meeting the Association presented a complete draft of contract proposals to Local 455, based upon, but more favorable to the employers than, the Allied contract and offered a substantial wage increase in return for their acceptance (A. 2131; 1881, 1965, 1977, 1663, 94-95, 2043-2048, 2279-2307). The proposal was rejected by Colavito as totally unacceptable (A. 94-95, 388, 1891).

B. The Commencement of the Strike  
and the August Meetings

On July 1, 1975, the contracts having expired, Local 455 struck all employers in the industry whose employees it represented, regardless of multi-employer bargaining association affiliation, who had not signed new contracts (A. 2094; 94, 208-209). Also on July 1, Local 455 circulated to all the employers and to its own agents a stipulation substantially modifying its prior demands. The stipulation not only reduced the wage demand from 15 percent to 10 percent but also modified the demands on other proposals. Settlements were reached with some independent employers on the basis of the proposal and it was presented to Allied in a July meeting called by the Federal Mediation Service (A. 2094-2095; 954A-956A, 341-346, 2267).

The next bargaining session between Local 455 and the Association, held in late August under the auspices of the New York State Mediation Service (A. 2095; 95), was preceded by a meeting, probably on the afternoon of August 25, between Spigner and Colavito (A. 2095; 95). At that meeting some discussion of the contract provisions under negotiation took place, and Spigner raised the matter of Local 455 having signed an independent employer agreement with Dextra Industries, an employer member of the Association who had



withdrawn and approached Local 455 for a contract (A. 2096, 2129; 1911, 95-97, 214-215, 395-400). Spigner heatedly informed Colavito that unless Local 455 agreed to the Association's demand for contract provisions such as Allied's, the Association would replace Local 455 with the Teamsters, who would "crack heads". Spigner further stated that three members of the Association had already been approached by Teamsters Local 819 (A. 2096, 2197; 96-97, 397-398, 1909-1910).<sup>5/</sup>

At the late August negotiating session, Local 455 formally provided the Association with its July 1 proposals for contract modification (A. 2097; 344-345, 954A-955A).<sup>6/</sup> The proposals and demands made by Local 455 were the same as those offered Allied and the independent employers, but as they did not include provisions concerning the Allied contract differences, the meeting accomplished very little (A. 2097; 345-347, 955A, 1904-1905).

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<sup>5/</sup> Spigner identified Charla Iron and North Shore Iron as two shops approached by Local 819 (A. 1910). The third employer was not identified.

<sup>6/</sup> The Association had been apprised of the proposals at the time of their release due to the broad distribution it received (A. 2097; 967A).

- C. While Negotiations Continue, the Association and the Employers Assist Local 810 to Organize the Employees; Employees Are Threatened and Discharged for Supporting Local 455; Contracts Are Signed with Local 810

In September and October 1975, additional bargaining sessions under the auspices of the State Mediation Service were held. The Allied contract differences were still the center of discussion and little progress was made (A. 2097; 403-405). During October, in the course of addressing a meeting of the Association membership at which many non-member employers were also present, labor relations advisor Brickman suggested to the assembled group that there were unions other than Local 455 interested in expanding their membership among the employees in the industry (A. 2100; 1003-1004). He inquired if the employers wished him to contact other unions to talk to their employees to see if they were interested in getting involved in another union. He was told to go ahead and do so. At a later meeting of Association members at which nonmember employers were also represented, Brickman indicated that he had spoken to Local 810 and that the employers were being contacted (A. 2100-2200; 1003-4, 1011-12).

At another such an open meeting of the Association membership in November at which nonmembers were present, Dennis Silverman, president of Local 810, addressed the



assemblage at the invitation of the Association. He discussed the advantages and services Local 810 could offer the employees in terms of pension plans, hospitalization, retirement plans, and other such employment conditions (A. 2100; 999-1002, 1988, 2012-2013).

At about the same time, Brickman suggested to Ed Peele, a member of the Association's negotiating team, that he go to Local 810 offices and obtain a copy of its contract for examination. Peele, together with Dan Doyle, another member of the negotiating team, did go to Local 810 for that purpose. After examining the contract, they informed other Association members of its provisions (A. 2200; 1640-1646).

1. Greenpoint Ornamental

On a number of occasions between Labor Day 1975 and January 1976, Greenpoint President George Geuther, Jr., engaged his employees in conversation while they were picketing on behalf of Local 455. In the course of those conversations he told them that he would have nothing further to do with Local 455, that the employees would have to join Local 810 in order to continue to work for him, and that they would be without a job if they did not (A. 2140; 537). Geuther informed the employees that they would lose nothing by transferring to Local 810 since their pensions would move with them (A. 2102; 840, 1028-1033).

Geuther told employee Gontorski that he had signed a contract with Local 810 - which he had done on November 20, 1975 (A. 2103; 1042) - and offered to take Gontorski and other employees to Local 810's office, stating that if they didn't sign up with Local 810 he would replace them with Local 810 members (A. 2102; 840-844). During the same period Geuther had a number of conversations with employee Gulino, sometimes with other employees present, at which he tried to persuade him to change unions, assuring him that his pension would go with him, and offering him a 10 percent increase in wages if he would join Local 810 and come back to work. Upon Gulino's repeated refusals, Geuther told him he had better look for another job (A. 2102; 1023-1024). Employee Matzell received a registered letter from Geuther directing him to report for work on November 10. Matzell did not do so and when he reported for work in January, at the conclusion of the strike, he was told that he did not have a job. Geuther also told Matzell during this period that he would never sign a contract with Local 455 (A. 2102, 2140; 537-544). Employee Sieminski also received a letter directing him to return to work on November 10. When he and the other employees saw Geuther shortly thereafter and refused to return to work until a contract was signed with Local 455, Geuther told them to look for another job (A. 2140; 1028-1030).



## 2. Long Island Steel

In early December 1975, Long Island President Davidson assembled his seven striking employees at the company's office for a meeting. There Davidson, and company Vice President Steinfeld, urged the employees to abandon Local 455 and join Local 810 or go nonunion, assuring them of steady employment if they did, but telling them that if they did not the company would close its doors. Davidson told them that Long Island would never again sign with Local 455. When employee Frenna expressed disapproval and declined to join Local 810, Davidson told him, on that and one other occasion, that he had better look for another job (A. 2103; 731-735, 749-755, 815-817).

Davidson called the employees together for another meeting about a month later. He again urged them to join Local 810 and assured them they would not lose their pension or other benefits if they did so but that he would close the company's doors if they did not (A. 2103; 817-819, 778). About a week after the second meeting Davidson took two of his employees to Local 810 offices where he remained with them while representatives of Local 810 explained that union's system of benefits (A. 2104; 792-798). Long Island Steel signed a collective bargaining agreement with Local 810 on January 6, 1976 (A. 2104; 1042). Subsequently, about February 25, Long Island Vice President Steinfeld told picketing employer Bender that Long Island Steel had signed an agreement with Local 810 and all the striking employees were out of jobs (A. 2140; 798).

3. Trojan Steel

At the end of August 1975, Trojan Steel President Feinglass invited picketing employee Plaza to return to work. When Plaza stated that he could not return to work until Feinglass signed a contract with Local 455, Feinglass told Plaza that Trojan would never sign with Local 455 and that as long as Plaza was a member of that union he would not be permitted to return to work (A. 2107; 490-491).

4. Roma Iron

In July 1975, Roma President Romanelli approached picketing employee Ruiz and told him that "If you guys keep striking with 455, I have to go out of business" (A. 2106; 832-833). Also during the summer, Romanelli engaged picketing employee Farkas in a conversation. In response to Farkas' inquiry as to why Romanelli did not sign up with Local 455 so the men could go back to work, Romanelli told him that he wanted to "join" Local 810 and would not sign with Local 455. He showed Farkas a stipulation from Local 810 listing employee benefits and assured Farkas that he would not lose any benefits such as pensions or vacations which he had earned under the Local 455 plans (A. 2106; 248-251).

In November 1975, Romanelli called employee Ruggieri to come down to the office. At the meeting Romanelli asked him to join Local 810, stating that he could not afford to stay



with Local 455. He also informed Ruggieri that he would close the shop rather than sign with Local 455, and would never sign with Local 455 (A. 2105; 232-234). Also in November, Romanelli called employee Dynia at his home and asked him if he would sign a card to join another union, and invited Dynia to go with him to that union's office. Dynia met Romanelli at his office and, with another employee, was driven by Romanelli to Local 810's office. There a union representative explained to the employees the benefits that would be provided by Local 810. During the conversation with Dynia, Romanelli told him that he would have to close the shop if he stayed with Local 455 (A. 2106; 293-301).

In January, Romanelli called Ruggieri and again urged him to join Local 810, stating that Roma would never sign with Local 455. Romanelli offered to take Ruggieri to the Local 810 offices and did so. There Romanelli introduced Ruggieri to a union representative who explained Local 810's benefits. Romanelli participated in the discussion and informed Ruggieri that all his benefits accrued with Local 455 could be taken with him to Local 810 (A. 2105; 234-241). Also in early January, employee Farkas, having heard that an agreement had been reached with Allied, went to the shop and asked Romanelli if he was going to sign with Local 455 so that the men could get back to work. Romanelli told him that he would

never sign with Local 455 but wanted to join Local 810 (A. 2106; 251-252). The record does not show that Roma ever signed a contract with Local 810 (A. 2106).

5. Zaffino and Sons

Zaffino, whose employees had been laid off even before the strike for lack of work (A. 2107; 866), called several of his employees, among them employees Howell and Riess, to the office for a meeting on a Saturday in mid-January 1976. Bruno Zaffino told the employees that Local 455 was "pushing him out, money wise" (A. 2107; 459) and asked the employees to join Local 810. He told them that if they did so they would retain their retirement pension and other benefits, but that he would have to close up if they stayed with Local 455. He showed Riess and the others Local 810 literature including a copy of a Local 810 Welfare Plan (A. 2107; 478-481, 458-461, 22362). Two days later, Zaffino called Howell and asked him if he would like to take a ride down to the Local 810 office. When Howell told him he would rather stay with Local 455, Zaffino told him "you better watch your ass, we are going to watch ours" (A. 2107; 460).

Shortly after the meeting with the employees, Bruno Zaffino drove up to a group of his employees gathered in front of the home of one of them, and invited them to go with him to the Local 810 offices. They accepted. At



Local 810 they were met by two representatives of that union who explained to them Local 810's pension plans, vacation plans and other fringe benefits. After the discussions, Zaffino drove the men home. Zaffino did not, however, at any time enter into a collective bargaining agreement with Local 810 (A. 2108; 556-562, 574-578, 853-856).

6. Paxton Metalcraft

In mid-January 1976, Paxton employee Monturo visited the shop in response to a call from Paxton President Mayer. Mayer asked Monturo to change membership to Local 810 and come back to work. When Monturo was reluctant to change unions, Mayer told him to think carefully, since he could be replaced unless he changed affiliation to Local 810 (A. 2105; 316-317).

Employee Palazzo went to the Paxton shop on January 22, 1976, seeking work. He spoke to Mayer who told him that Local 810 was now the company union rather than Local 455, and that if Palazzo came back to work he would have to join Local 810 after one month. Mayer told Palazzo that he had signed a collective bargaining agreement with Local 810 (A. 2105; 520-521, 525-527). Paxton had signed a collective bargaining agreement with Local 810 on December 15, 1975 (A. 2105; 1042).

7. Master Iron Craft

In mid-February, employee Waldman spoke to Master Iron Craft President Sheiner about coming back to work. Scheiner told him that he couldn't take him back because the shop belonged to Local 810, and that he had dropped Local 455 (A. 2104; 272-273). Master Iron Craft had signed a collective bargaining agreement with Local 810 on January 28, 1976 (A. 2104; 1042).

8. Other Employers signing  
contracts with Local 810

In addition to Greenpoint Ornamental, Long Island Steel, Paxton Metalcraft and Master Iron Craft, referred to supra, the following employer-members of the Association signed collective bargaining agreements with Local 810: Roman Iron on November 18, 1975; Melto Metal on December 22, 1975; Mohawk Steel on January 9, 1976; Koenig Iron on January 30, 1976; and Cervanka and Sons on February 17, 1976 (A. 2109; 1041-1044). Each of the contracts contained union security provisions requiring the employees to become and remain dues paying members of Local 810 (A. 2111; 1041-1045).

D. The Meeting of January 14  
and the Notification of  
Withdrawal of Bargaining  
Authorization

Settlement between Local 455 and Allied was reached in early January 1976. With the final details of that contract then available, a bargaining session between Local 455 and



the Association was held on January 14, 1976. Because of rumors in the industry that some shops had signed with Local 810, Colavito several times asked Spigner if the Association was still authorized to bargain for all the employer members. Spigner declined an answer, telling Colavito that he had already had been given a list of the members of the Association (A. 2128; 410-412, 1919). The terms of the Allied settlement were discussed, and Local 455 offered the 35-cent per hour wage settlement and 21-cent fund settlement reached with Allied together with the basic provisions of the standard independent contracts previously negotiated with the independent employers (A. 2128; 412-413). After caucusing, the Association representatives rejected the offer, and through the mediator advised Local 455 that if it would offer to the Association the exact contract negotiated with Allied, the representatives would recommend acceptance of the offer. Colavito declined, noting that the Local was negotiating a contract with the Association and was not going to give them someone else's contract (A. 2133, 2099; 413-414, 1920-1921). The meeting ended on the basis that the parties would be called for further negotiations by the mediator (A. 2129; 413-414).

On January 19, 1976, Local 455 received a letter dated January 16 from the Association advising it that the 19 Association members listed thereon had withdrawn negotiating

authority from the Association, and that the Association no longer considered them to be part of the bargaining group.

The employers listed were (A. 2097; 2215):

|                       |                      |
|-----------------------|----------------------|
| Achilles Construction | Melto Metal          |
| Bay Iron              | Mohawk Steel         |
| Esco Iron             | Paxton Metalcraft    |
| Greenpoint Ornamental | Peele Company        |
| Heuser Iron           | Roman Iron Works     |
| Ikenson Iron          | Spigner and Sons     |
| Koenig Iron           | Trojan Steel         |
| Kuno Steel            | Weatherguard Service |
| Long Island Steel     | Zaffino and Sons     |
| Master Iron Craft     |                      |

By letter dated January 20, 1976, to the Association, Colavito took exception to the contents of that letter and informed Spigner that Local 455 did not consent to the purported withdrawals. Colavito noted that a negotiation meeting had been set up by the Mediation Service for January 23 at 10:00 a.m., and insisted that any agreement ultimately reached would be binding on all the employers covered by the original agreement, absent a specific agreement by Local 455 to the contrary (A. 2098; 98-100, 2216).

E. The Negotiation of a Contract  
Between Local 455 and Remaining  
Members of the Association

The January 23 meeting was initiated by the Mediation Service at the request of Dan Doyle, who had served on the Association's bargaining committee and was president of Brakewell Steel, which had not withdrawn its authorization



from the Association (A. 2098; 104-104, 1280). <sup>7/</sup> Present, in addition to Doyle, were Seymour Kaplan, president of Carlin Manufacturing and treasurer of the Association, and two Naiztat brothers, representing Naiztat Iron. Present for Local 455 were Colavito and executive board member Mannsman (A. 2098; 1285). Doyle stated that neither he nor any of the others present was authorized to speak on behalf of the Association, explaining that they represented only their own companies. Colavito immediately objected, stating that he understood that he was coming to a meeting with the Association, and that as far as he was concerned the employer members present represented the Association (A. 2134;1285-1287). After a brief delay, the issue was set aside for the moment and negotiations commenced. The contract proposed by Local 455 was discussed point by point with the employer-members. After all day negotiations, agreement was reached on modifications of the union proposal to comprise a complete contract, but its signing was deferred pending resolution of individual problems unique to each shop (A. 2135; 1287-1289, 957A-958A, 2217).

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<sup>7/</sup> On Wednesday, January 21, Doyle and Colavito had met and discussed the situation in general terms (A. 2134;1280-1283).

On Saturday morning, January 24, Colavito met Doyle at the Brakewell Steel shop where representatives of Wortman Iron, an Association member who was a customer of Brakewell's, were also present in accordance with arrangements made the previous day. Problems unique to Brakewell and to Wortman were worked out with Colavito but no stipulation was signed at that point. Colavito again raised the matter of the employers signing as representatives of the Association, but Doyle insisted that they could only negotiate for their individual companies (A. 2135; 1293-1295).<sup>8/</sup>

Another meeting was held with Local 455 on Monday, January 26, when the representatives of the four companies were joined by the Uydess brothers, representing Bay Iron. One of the brothers, Lawrence Uydess, had also served on the negotiating committee of the Independent Association (A. 2135; 1296, 1317-1318). The unique particulars of the contracts for Carlin Manufacturing and Naiztat Iron were worked out that day and they each signed the stipulation. Although Colavito initially insisted they sign on behalf of the Association, when the employers continued to insist that they

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<sup>8/</sup> Spigner had learned of the negotiations and on January 24 sent Colavito a telegram advising him that all negotiating authority of the Association had been reserved to its president and any members negotiating were representing only their own interests (A. 424-425, 2311).



were not authorized to do so, Colavito suggested they sign simply as members of the Association. They signed in that form (A. 2135-2136; 1296-1300, 445, 451-452, 2217). As further particular shop details were worked out, Brakewell Steel, Wortman Iron and Bay Iron all signed the stipulation on January 28, 1976. Each signed, at Colavito's insistence, as a member of the Association (A. 2136; 2217).

F. Local 455 Requests the Other  
Association Members to Sign the  
Stipulation

Subsequent to execution of the stipulation by the five employer-members of the Association, Local 455 sought the signatures of the other members to the stipulation. On February 27, identical letters were sent to 16 of the remaining employer-members of the Association, on March 1 to Cervanka and Sons and on March 31 to Peele Company.<sup>9/</sup> The letters from Local 455, over the signature of Colavito, reminded the employers of their obligations to bargain as a part of the multi-employer unit, and reiterated the union's view of the illegality of any attempt to withdraw from that obligation. It informed the employers of the execution of the January 23 stipulation, a copy of which was enclosed, and that Local 455 considered it binding on the employers as members of the

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<sup>9/</sup> All respondents herein who had not signed the stipulation received a copy of the letter.

Association. The letter further demanded that the individual employers implement the agreement represented by the stipulation (A. 2124; 885-889, 2237, 2238).

Heuser Iron and Trojan Steel were the only other employers who thereafter executed stipulations, which were in both instances identical to the January 23 stipulation (A. 2136; 961A-962A, 890, 1586-1589, 2313).

G. Local 455 Requests  
Reinstatement of the  
Employees

Concurrently with the letters to each of the employers advising them of the stipulation and demanding their implementation of it, Local 455 sent each of them a separate letter, over Colavito's signature, requesting reinstatement of the striking employees (A. 2123-2124; 885-888, 2238). The letters uniformly stated:

On behalf of your striking production and maintenance employees, we repeat the request previously made that they unconditionally return to work at their previous or substantially similar jobs.

Please advise us of the date and time that you desire them to report to work.

Heuser Iron and Trojan Steel were the only other employers who thereafter reinstated their employees (A. 890).



## II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the actions of the Association in advising the employer-members of the interest of Local 810 in representing the employees, in contacting Local 810 to initiate organizational activity, and in arranging for the president of Local 810 to attend an Association meeting to explain to the employers the advantages of a contract with Local 810, were forms of assistance and support to Local 810 violative of Section 8(a)(2) and (1) of the Act (A. 2145). The subsequent actions of certain of the employer-members of the Association in soliciting and inducing their employees, while they were members of Local 455, to become members of Local 810, and in transporting employees to Local 810 headquarters where, in the employer's presence, Local 810 representatives explained the advantages of membership to the employees, were also found to be assistance and support violative of Section 8(a)(1) and 8(a)(2) of the Act. As those actions were also in derogation of the representative status of Local 455, they were further found by the Board to be in violation of Section 8(a)(5) of the Act (A. 2110, 2145). The execution by some of those employer-members of collective bargaining agreements with Local 810 containing union security clauses was also found by the Board to be assistance and support

violative of Section 8(a)(1) and 8(a)(2) of the Act, a discriminatory requirement of union membership in violation of Section 8(a)(3) of the Act, and an undermining of the representative status of Local 455 in violation of Section 8(a)(5) of the Act (A. 2110-2111).

The Board found that the attempt of the employer-members to withdraw from the Union authority to bargain on their behalf was untimely and not otherwise justified by unusual circumstances, and did not relieve either employers or the Association of the obligation to recognize and bargain with Local 455 as the representative of the employees in the multi-employer unit (A. 2141-2142). Their refusal to continue to so recognize and bargain with Local 455 was found violative of Section 8(a)(5) and (1) of the Act (A. 2145; 2144). Their refusal to execute and implement the contract subsequently negotiated by Local 455 with certain employer-members of the Association was also found to be violative of those sections (A. 2146).

The Board further found that the threats made by certain of the employers to their employees of detrimental consequences if the employees continued to support Local 455 were violative of Section 8(a)(1) of the Act (A. 2145), and the discharge of employees for that reason and because of replacement by employees belonging to Local 810 were found



violative of Section 8(a)(3) and (1) of the Act (A. 2140-2141, 2145). The strike which commenced during the bargaining negotiations was found by the Board to have been converted into an unfair labor practice strike at least by January 16, 1976, and the employers' subsequent refusal to reinstate the striking employees upon their unconditional application was found to be violative of Section 8(a)(3) and (1) of the Act (A. 2141, 2145).

The Board's order requires the Association and the employer-members to cease and desist from the unfair labor practices found, and to cease recognizing or giving effect to the contracts with Local 810 (A. 2146-2147). Affirmatively, the Board's order requires the Association and the employers to recognize and bargain collectively with Local 455 and, except for Heuser Iron and Trojan Steel, to sign and implement the collective bargaining agreement dated January 23, 1976 (A. 2151). The order also requires the Association and the employers, with the exception of Heuser Iron and Trojan Steel, to offer their striking employees immediate and full reinstatement to their former or substantially equivalent jobs and make them whole for any losses suffered from the date of their unconditional applications for reinstatement (A. 2151-2152). Those employers who had been operating under

contracts with Local 810, in addition to reimbursing their employees for wage losses, are also required to provide reimbursement for initiation fees, dues and assessments paid Local 810 (A. 2152).

ARGUMENT

I. THE ASSOCIATION AND CERTAIN  
EMPLOYERS VIOLATED SECTION  
8(a)(1), (2) AND (5) BY  
SOLICITING EMPLOYEES TO  
ABANDON LOCAL 455 AND JOIN  
Local 810

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization. . . ." Such conduct also violates Section 8(a)(1) because it interferes with the employees' right to choose their own representative as secured to them by Section 7 of the Act. Heinz Company v. N.L.R.B., 311 U.S. 514, 518-519 (1941). When engaged in on behalf of a nonincumbent union at a time when the employer is under an obligation to recognize and bargain with an incumbent union as representative of the employees involved, such conduct also violates Section 8(a)(5) of the Act because it is in derogation of and seeks to undermine the existing bargaining relationship. Medo Photo Corp. v. N.L.R.B., 321 U.S. 678, 683-687 (1944); N.L.R.B. v. Palette Stone Corp., 283 F. 2d 641, 642 (C.A. 2, 1960).



Applying these principles, the Board found that both the Association and a number of the employers herein violated those sections of the Act through prohibited assistance to Local 810. As we shall now show, those findings are fully supported by the record and entitled to affirmance.<sup>10/</sup>

A. Assistance to Local 810 by  
the Association

The Board's finding that the actions of the Association<sup>11/</sup> were "the sparking point" (A. 2101) for the illegal assistance to Local 810 by the individual employers aptly characterizes

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<sup>10/</sup> This case primarily presents factual issues to be resolved in accordance with well settled legal principles. The Board's findings are entitled to acceptance by this Court if they are supported by substantial evidence of the record as a whole. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 491 (1951); Continental Insurance Company v. N.L.R.B., 495 F. 2d 44, 47 (C.A. 2, 1974); N.L.R.B. v. Fitzgerald Mills Corp., 313 F. 2d 260, 268 (C.A. 2, 1963), cert. denied 375 U.S. 834. In those instances where credibility issues have been resolved, as this Court has repeatedly stated, the question of credibility of witnesses is primarily one for the trier of fact who can observe the witnesses, and the Court will not reverse credibility resolutions unless the credited testimony is "hopelessly incredible" on its face or "flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (C.A. 2, 1952). Accord: N.L.R.B. v. Columbia University, 541 F. 2d 922, 928 (C.A. 2, 1976); N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1965).

<sup>11/</sup> The Association, as a "person acting as an agent of an employer," is an "employer" within the meaning of that term as defined in Section 2(1) of the Act, and was so found by the Board (A. 2089). As such, it is responsible for its unfair labor practices as an entity distinguishable from the employers comprising its membership.

the situation. As related in the Statement, at an October meeting of the Association membership at which a number of nonmember employers were represented, the Association's labor relation advisor, Herman Brickman, who was employed as an arbitrator by Local 810, suggested that unions other than Local 455 might be interested in representing the employees.<sup>12/</sup> He sought and obtained authorization from the membership to contact other unions to organize the employees, and subsequently reported back that Local 810 was contacting the employees.<sup>13/</sup> To further assist Local 810 by providing it with access to

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<sup>12/</sup> The willingness of the Association to turn to other unions had previously been expressed to Colavito by Spigner in their August conversation, supra, p. 12.

<sup>13/</sup> The ruling of the Administrative Law Judge that statements by Brickman to the membership were not to be excluded under the attorney-client privilege when counseling illegal activity or made in the presence of other persons whom he did not represent (A. 2101; 992-995), was correct and clearly within his discretion to rule on the admissibility of evidence. Section 501 of the Federal Rules of Evidence provides for the application of the common law rule under these circumstances. The privilege is inapplicable where circumstances establish that confidentiality is not intended or has been waived, as in the instant case where nonmembers of the Association were at the meetings when the statements were made. United States v. Tellier, 255 F. 2d 441, 447-448 (C.A. 2, 1958), cert. denied 358 U.S. 821. Additionally, it is to be noted that under the rule conversations relating "to an intended or ongoing illegality" are not within the privilege. Matter of Doe, 551 F. 2d 899, 900-901 (C.A. 2, 1977); United States v. Bob, 106 F. 2d 37, 40 (C.A. 2, 1939), cert. denied, 308 U.S. 589.



the employers to persuade them of the desirability of signing up with that union, the Association brought Local 810's President, Dennis Silverman, to an Association meeting to address the employer-members on the local's contracts and the benefits they provided for the employees. In the circumstances presented, the Association's solicitation of a new representative for the already-represented employees of its members was clearly violative of Section 8(a)(1), (2) and (5) of the Act under the principles set forth above. N.L.R.B. v. Fotochrome, 343 F. 2d 631, (C.A. 2, 1965), cert. denied 382 U.S. 833; N.L.R.B. v. Getland Iron Works, 377 F. 2d 894, 896 (C.A. 2, 1967).

B. The Assistance to Local  
810 by the Employers

The actions of some of the employers to persuade their employees to abandon Local 455 and transfer to Local 810 were similarly unlawful. An outright abandonment of Local 455 to join Local 810 was urged by Long Island and Zaffino on their employees. Greenpoint President Geuther offered Gulino a 10 percent wage increase if he would join Local 810 and return to work. Both Greenpoint and Roma related to their employees the benefits of belonging to Local 810 in an effort to persuade them to change representatives, while Long Island, Zaffino and Roma went to the greater length of personally transporting their employees to the Local 810 offices where

they remained with the employees while a representative of Local 810 expounded on the benefits accruing to the members of that union. Such overt actions to persuade the employees to shift their allegiance to another representative are readily recognizable as assistance to Local 810 prohibited by Section 8(a)(2), as well as interference violative of Section 8(a)(1) and an undermining of Local 455's bargaining status in violation of Section 8(a)(5). International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940); N.L.R.B. v. Park Edge Sheridan Meats, Inc., 323 F. 2d 956, 958-959 (C.A. 2, 1963). The Board's findings to that effect should be affirmed.

II. BY RECOGNIZING AND EXECUTING CONTRACTS  
WITH LOCAL 810 CERTAIN EMPLOYERS VIOLATED  
SECTION 8(a)(1), (2), (3) AND (5) OF THE  
ACT

Experience has shown that the "labor peace" which multi-employer bargaining has fostered stems from the stability of bargaining relationships and uniformity of contract terms which are achieved by bargaining on the basis of a single unit encompassing all the employees of the various employers. N.L.R.B. v. Truck Drivers Local 449, Teamsters (Buffalo Linen), 353 U.S. 87, 94-96 (1957). In this case, on the basis of the facts shown in the Statement, there can be no doubt that the Board acted reasonably in finding that such a multi-employer unit comprised of all the employees of the employer-members of



the Association was in existence and that it was appropriate for bargaining purposes (A. 2145). Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491-492 (1947); N.L.R.B. v. American Steel Buck Corp., 227 F. 2d 927, 929 (C.A. 2, 1955). Once that multi-employer unit was established, it was the statutory obligation of each of the employers to recognize and bargain with the employee representative in that unit. They could no longer treat with a union representing their own employee complement as a separate unit. N.L.R.B. v. Sheridan Creations, Inc., 357 F. 2d 245, 248 (C.A. 2, 1966), cert. denied 385 U.S. 1005.

Notwithstanding that limitation, nine of the employer-members of the Association entered into collective bargaining agreements with Local 810 recognizing it as representative of their employees in a unit limited to their own employee complements.<sup>14/</sup> As the employee complements of those employers,

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<sup>14/</sup> These contracts were signed at various times in the three-month period November 18, 1975, to February 17, 1976, following the Association's October invitation to Local 810 to begin organizing the employees. Six of the contracts were executed prior to the purported withdrawals of January 16, 1976, but since those withdrawals were not effective to relieve the employers of their obligation to bargain in the multi-employer unit, as shown infra, pp. 39-48, the withdrawal action is of no significance even for the three who signed thereafter. Similarly without significance are the contentions of Koenig Iron, Master Iron Craft, Mohawk Steel and Paxton Metalcraft that their execution of contracts with Local 810 was at the demand of a majority of their employees. The contracts were for single employer units and the purported majorities were only in those units.

either individually or collectively, would under no circumstance approach a majority of the employees in the multi-employer unit (A. 2113, 2114), by signing with Local 810 the employers extended recognition to a minority union, thereby violating Section 8(a)(1) and (2) of the Act. International Ladies Garment Workers Union v. N.L.R.B., 366 U.S. 731, 736-738 (1961). The execution of the contracts, furthermore, was in derogation of Local 455's status as majority representative in the multi-employer unit, and therefore violative of Section 8(a)(5). N.L.R.B. v. Sheridan Creations, Inc., supra, 357 F. 2d at 248. As the contracts were entered into with a labor organization which had been assisted in violation of Section 8(a)(2) and (1) of the Act, and were not in an appropriate bargaining unit, the union security clauses in them requiring union membership and the payment of dues and membership fees as a condition of employment were not protected by the first proviso to Section 8(a)(3). The execution and administration of those provisions therefore constituted the imposition of an illegal condition of employment violative of Section 8(a)(3) and (1) of the Act, as found by the Board. N.L.R.B. v. Revere Metal Art Co., 280 F. 2d 96, 99-100 (C.A. 2, 1960) cert. denied 364 U.S. 894; N.L.R.B. v. Raymond Buick and Amalgamated Local Union 355, 445 F. 2d 644, 644-645 (C.A. 2, 1971); N.L.R.B. v. Getlan Iron Works, supra, 377 F. 2d at 896.



III. BY THREATENING EMPLOYEES TO  
COERCE THEM TO JOIN LOCAL 810  
CERTAIN EMPLOYERS VIOLATED  
SECTION 8(a)(1) OF THE ACT

The Act guarantees to employees "complete and unfettered freedom of choice" with respect to the selection of a bargaining representative. N.L.R.B. v. Link-Belt Co., 311 U.S. 584, 588 (1941). An employer's use of coercive statements and threats of economic detriment within its control to influence that choice breaches that guarantee and is clearly violative of Section 8(a)(1) of the Act. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617-620 (1969); N.L.R.B. v. River Togs, Inc., 382 F.2d 198, 202 (C.A. 2, 1967); N.L.R.B. v. General Stencils, 438 F.2d 894, 900-901 (C.A. 2, 1971).

As shown by the Statement, a number of the employers engaged in coercive statements of that proscribed nature. Greenpoint Ornamental, Long Island Steel and Trojan Steel threatened employees with discharge or loss of work by telling them they could not work unless they joined Local 810, or so long as they were members of Local 455. Long Island Steel, Roma Iron and Zaffino and Sons threatened employees that they would close the shops if the employees insisted on remaining with Local 455, and Greenpoint Ornamental, Trojan Steel and Roma Steel told employees that they would never sign a contract with Local 455. In each of those instances the employer had it within its power to cause the threatened reprisal to occur. The statements clearly violated Section 8(a)(1) of the Act, as

found by the Board, and the Board's order in that respect should be enforced by this Court. N.L.R.B. v. Midtown Service Co., 425 F. 2d 665, 667 (C.A. 2, 1970) (threats of loss of jobs); Irving Air Chute Company v. N.L.R.B., 350 F. 2d 176, 178-179 (C.A. 2, 1965) (threats of discharge and closing of plant); N.L.R.B. v. General Stencils, supra, 438 F. 2d at 900 (threats of closure); N.L.R.B. v. Sky Wolf Sales, 470 F. 2d 827, 830-831 (C.A. 9, 1972) (threats never to sign contract with union).

IV. THE ASSOCIATION AND THE EMPLOYERS VIOLATED  
SECTION 8(a)(5) AND (1) BY REFUSING TO  
RECOGNIZE AND BARGAIN WITH LOCAL 455 AS  
REPRESENTATIVE OF THE EMPLOYEES

In exercising its "specialized judgment" with respect to questions about multi-employer bargaining relationships (N.L.R.B. v. Truck Drivers Local No. 449 (Buffalo Linen), supra, 353 U.S. at 96) the Board, with court approval, has determined that when a member of a multi-employer bargaining unit attempts to withdraw from the unit after negotiations have begun his withdrawal is "untimely", absent the consent of the union or the presence of unusual circumstances, and therefore ineffectual to relieve it of its obligation to recognize the union in that unit and to be bound by any agreement ultimately reached. Retail Associates, 120 NLRB 388, 393-395 (1958); N.L.R.B. v. The John J. Corbett Press, Inc., 401 F. 2d 673, 675 (C.A. 2, 1968); N.L.R.B. v. Sheridan Creations, Inc., supra, 357 F. 2d at 247-248; N.L.R.B.



v. Johnson Sheet Metal, 442 F. 2d 1056, 1059 (C.A. 10, 1971). These determinations are designed to protect the stability and effectiveness of multi-employer bargaining, which would be impaired if a party could withdraw whenever it was dissatisfied with the course of bargaining (N.L.R.B. v. Tulsa Sheet Metal Works), 367 F. 2d 55, 58 (C.A. 10, 1966) or could use the threat of withdrawing as a "bargaining lever". N.L.R.B. v. Sheridan Creations, supra, 357 F. 2d at 248. As we now show, the purported withdrawals from the multi-employer unit by 19 of the employers on January 16 was untimely and not otherwise justified. Therefore, the Board correctly held that the subsequent refusals of the Association and those employers to recognize and bargain with Local 455 was violative of Section 8(a)(1) and (5) of the Act.

A. The Withdrawals Were Untimely  
and Without Local 455's Consent

The first negotiating session between the Association and Local 455 took place on June 16, 1975. As shown in the Statement, supra, pp. 22-23, the letter from Spigner to Colavito advising Local 455 of the withdrawal of bargaining authorization from the Association by the 19 named employer-members was dated January 16, 1976, and received by Colavito on January 19. The withdrawals, occurring as they did well after the commencement of negotiations, were therefore clearly untimely. Further, not only did Local 455 not consent to the

withdrawals, but by the letter of January 20 to Spigner Colavito immediately took strong exception to the January 16 letter, insisting that the multi-employer unit was not a unilateral arrangement and that any agreement worked out would be binding on all the employers covered in the original agreement. At no time subsequently did Local 455 by word or action deviate from that position.

B. The Withdrawals Were Not  
Justified by Unusual  
Circumstances

Before the Board the Association and the Respondent-Employers contended that the withdrawals were justified because of the presence of unusual circumstances, namely: dire economic circumstances and an impasse in bargaining negotiations. Initially it is to be noted that such reasons were not asserted in the letter notifying Local 455 of the withdrawals, nor was any justifying explanation for that action otherwise communicated to it. Under these circumstances, "the contention appears to be an afterthought." N.L.R.B. v. Tulsa Sheet Metal Works, Inc., *supra*, 367 F. 2d at 58. A factor which "play[s] no role in [a party's] withdrawal . . . [cannot] serve to isolate respondent from the Board's 8(a)(5) finding." N.L.R.B. v. Central Plumbing Co., 492 F. 2d 1252, 1254 n.3 (C.A. 6, 1974).

The Board has found withdrawals from multi-employer bargaining disrupting the multi-employer unit justified because of economic conditions only where "the very existence



of an employer as a viable business entity has ceased or is about to cease." Hi-Way Billboards, 206 NLRB 22 (1973), enforcement denied, 500 F. 2d 181 (C.A. 5, 1974).<sup>15/</sup> No showing was made on this record that any individual employer was in dire straits of such a nature. Although the Board noted that two of the employers, Ikenson Iron and Spigner and Sons, had no business whatever since before the strike, it also found that with the possible exception of Ikenson, there was no showing that any employer was nearing bankruptcy. In so finding, the Board fully recognized and considered the depressed economic state of the entire New York City building and construction trades industry at the time of these events (A. 2090, 2142).

Nor was there, on the facts of this case, an impasse in bargaining negotiations at the time of the withdrawals which could justify those actions. Impasse has been defined as the point in negotiations where there is "no realistic

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<sup>15/</sup> See, e.g., U.S. Lingerie Corp., 170 NLRB 750, 751 (1968) (bankruptcy predating withdrawal from negotiations); Spun-Jee Corp. and the James Textile Corp., 171 NLRB 557, 558 (1968) (economic hardship inherent in the continuance of business in the geographic area); Atlas Electrical Service Co., 176 NLRB 827, 830 (1969) (employer forced to close business for lack of qualified employees and union refused to provide replacements to keep operation alive).

possibility that continuation of discussion at that time would have been fruitful." American Federation of Television and Radio Artists v. N.L.R.B., 395 F. 2d 622, 628 (C.A.D.C. 1968). The Board's finding that "as of the date of withdrawal no true impasse existed" (A. 2129), based as it is upon an analysis of the continuing movement and changes in the bargaining positions of the parties, particularly on the part of Local 455, which still continued at the January 14 meeting, is clearly correct and supported by substantial evidence on the record.

Thus, as shown in the Statement, supra, when Colavito was advised of the formation of the Association, he immediately agreed to bargaining in that manner. As Local 455 then had individual contracts with each of the employers in the form of the standard independent contract, the first proposal it made to the members collectively as a new Association was the same proposal it would otherwise have made to them individually as independent employers - namely, the stipulation for the new three-year standard independent contract. At the initial meeting the Association's preoccupation with the Allied contract differences precluded any discussion of Local 455's initial proposal, although at the June 30 meeting Colavito advised them of the 15 percent wage increase and 5 percent



fund increase sought by Local 455. Despite all the talk at those first sessions centered on the Allied contract differences, Spigner's testimony makes clear that in the sessions prior to the strike the Association was not seeking - and would not have accepted - an agreement limited to those provisions, but rather that the initial contract proposal of which it sought acceptance was the proposed contract which it tendered to Local 455 at the meeting on June 30 (A. 1966-1968). Colavito's view of that Association proposal was that "they were so far down in retrogression on it there was no sense in bargaining with that position. Every single clause in the contract was reduced" (A. 388). But Local 455 continued to bargain, and shortly after the strike began modified the basic provisions of its initial proposal in some respects and reduced its wage demands to a 10 percent increase. That change of position was officially tendered the Association at the August negotiating session.

The record does not disclose any change of position by either party during the negotiating sessions in August, September and October, but bargaining did continue. The Association was still holding firmly to its initial proposal of June 30 as a basis for negotiations, as indicated by Spigner's statement in a conversation with Local 455

Business Agent Mateinzo in late 1975 to the effect that it would be very hard for the Association to resist an offer from Local 455 of the Allied contract (1916). Such a request for an offer of the Allied contract would have been pointless, had the Association's offer at that time been to accept that contract.

At the January 14 meeting, with the Allied contract signed and the broader industry wage levels and fund contributions determined, Local 455 again modified its contract proposal to offer the Association the reduced wage levels and fund contributions in that agreement. After the explanation by Colavito of the Allied agreement, the Association, through the mediator, offered to accept "the exact Allied agreement". The Association thus for the first time since June 30 moved away from its initial June 30 proposal and offered to agree to different provisions (A. 2133). Colavito's rejection of the exact contract demand because "we were negotiating a contract with them, we weren't going to give somebody else's contract to them" (A. 414), was not a rejection of the negotiability of the substance of the Allied contract provisions, but an insistence upon bargaining about their substance, rather than according the Association, without negotiation, the benefits of Allied's bargaining efforts and bargaining strength. It is



thus clear that in the course of the January 14 meeting, both sides presented new positions and the mere fact that they were each rejected does not result in impasse. N.L.R.B. v. Central Plumbing Co., supra, 425 F. 2d at 1254.

Also strongly supporting the Board's finding that no impasse occurred at the January 14 meeting, is the fact that at its conclusion the parties contemplated further meetings (A. 2129) and that at the next meeting an agreement was reached through Local 455's modification of some of its demands (A. 2133). N.L.R.B. v. Tulsa Sheet Metal Works, Inc., supra, 367 F. 2d at 58. The January 14 meeting closed with the understanding that the parties would be called by the mediator for the next session (A. 414), which is the same procedure which had been followed throughout all the previous negotiating meetings (A. 342, 1913, 1917). The mediator in fact shortly thereafter scheduled a meeting for January 23, 1976, and at that meeting an agreement was reached embodying a further modification of Local 455's position at the January 14 meeting (A. 957A-958A).

In view of the foregoing, the Board's finding that there was no impasse in negotiations because there was still a realistic possibility that continuation of discussion at that time would have been fruitful, should be affirmed by the court.

C. The Employers' Withdrawals from the  
Association Were Not Justified by  
Local 455's Bargaining Conduct

Before the Board the Association and the employers also contended, again for the first time in the sequence of events, that the withdrawals were justified because Local 455 was not bargaining in good faith with the Association (A. 2130).<sup>16/</sup> They had not, however, filed charges with the Board alleging such a refusal to bargain in violation of Section 8(b)(3) of the Act (A. 2132-2133).<sup>17/</sup> The Board's conclusion in this respect that "although Local 455 may have engaged in what could be termed 'surface bargaining', it did not engage in surface bargaining for illegal purposes," is dispositive of the

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<sup>16/</sup> It is to be noted that this position is inconsistent with the claim that a bargaining impasse existed on January 14, 1976. "But it is manifest that there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith." Industrial Union of Marine Workers v. N.L.R.B., 320 F. 2d 615, 621 (C.A. 3, 1963), cert. denied 375 U.S. 984; see also New York Printing Pressmen and Offset Workers Union No. 51, IPGCU v. N.L.R.B., 538 F. 2d 496, 501 (C.A. 2, 1976).

<sup>17/</sup> As the First Circuit has stated, "When an employer has refrained from presenting to the Board allegations of union misconduct, we will not entertain the suggestion that there has been conduct which prevents us from enforcing a Board order growing out of unfair labor practice charges which were presented for adjudication by the union." N.L.R.B. v. Crimptex, Inc., 517 F. 2d 501, 505 (1975).



contention (A. 2130). At the outset, Local 455 promptly accepted the Association and proposed a contract complete in all respects except for the wage and fund contributions which were supplied shortly thereafter. Its proposals throughout the negotiations were consistent with the industry pattern and it demonstrated a willingness to make concessions during the course of negotiations (A. 2133). Although it refused to accede to the Association's apparent desire for contract parity with Allied, that position was available to it as a permissible exercise of economic bargaining strength. Hence, no inference of illegality or lack of good faith is warranted in the circumstances. American National Insurance Co., 343 U.S. 395, 404 (1952).

V. THE ASSOCIATION AND CERTAIN  
EMPLOYERS VIOLATED SECTION  
8(a)(5) AND (1) BY REFUSING  
TO SIGN THE JANUARY 23 AGREE-  
MENT WITH LOCAL 455

As shown supra, the purported withdrawal of bargaining authorizations from the Association by some of its members on January 16 did not relieve either the Association or its employer-members of their statutory obligation to bargain in good faith with Local 455 as representative of the employees in the multi-employer unit. That statutory duty includes the duty to execute a collective bargaining agreement if one is reached. Section 8(d) expressly defines the duty "to

bargain collectively" to include "the execution of a written contract incorporating any agreement reached if requested by either party". See also Heinz and Co. v. N.L.R.B., supra, 311 U.S. at 526. This same requirement applies to an agreement reached in bargaining between a multi-employer association and the union representing the employees. See cases cited supra, p. 40. Since the Association continued to be the bargaining agent for its members, the Board properly found that the agreement reached on January 23, 1976, between Local 455 and the members, present at the bargaining session, was a contract of the Association binding on all members of the Association. Hence, the refusal of the Association and the other members to execute and implement that agreement upon Local 455's request was violative of section 8(a)(5) and (1) of the Act.

At the time of the January 14, 1976 bargaining session, the Association membership had been reduced from the 32 names supplied by Spigner in June 1975 to only 23 employers.<sup>19/</sup> By the January 16 letter, 17 of those 23 employers had attempted

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<sup>19/</sup> Atwater Iron, Balfour and Company, Dextra Industries, Esco Iron and Penner and Company had signed single employer contracts with Local 455. Island Tank and Weatherguard Services had ceased business and Charla Iron and Northshore Iron were involved in Board proceedings with Teamsters Local 819 as separate single employer units.



to withdraw from the Association.<sup>20/</sup> Thus, at the time of the January 23 bargaining session, only 6 of the initial 32 members still acknowledged their membership in the Association. Those six were Brakewell Steel, Carlin Manufacturing, Cervanko and Sons, Naiztat Steel, Roma Iron and Wortman Iron. When Colavito negotiated the contract on January 23, he was dealing with representatives of three of those six companies. On January 24, a fourth member of the six, Wortman Iron, joined the negotiations. Just as Colavito refused to consent to the purported withdrawals pursuant to the January 16 letter, he also refused on January 23 to consent when Brakewell Steel, Carlin Manufacturing, Naiztat Iron, and Wortman Iron sought to disclaim their obligation to bargain as part of a multi-employer unit by insisting they were bargaining only for their own companies. Thus, Colavito negotiated the January 23 agreement with the only Association members who would still honor their commitment to recognize Local 455. The others had either illegally extended recognition to Local 810 or had withdrawn bargaining authorization from the Association under circumstances which we have shown above to be invalid and ineffectual.

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<sup>20/</sup> Although 19 employers were listed on the letter, Esco Iron had previously signed with Local 455, and Weatherguard Services was out of business.

The Supreme Court has recognized "the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contract terms", N.L.R.B. v. Truck Drivers Local 449 (Buffalo Linen), supra, 353 U.S. at 96. It has also been recognized, however, that "to allow withdrawal from the multi-employer bargaining unit because negotiations are apprehended by . . . [some] of the group members to be progressing toward an agreement which would be economically burdensome insofar as . . . [they are] concerned, would be disruptive to the group bargaining process". N.L.R.B. v. Tulsa Sheet Metal Works, supra, 367 F. 2d at 58. Employers who invoke the advantages of group bargaining must assess and be prepared to assume the responsibilities and limitations inherent in that arrangement. Here, the Association and its members failed to accept their responsibilities in this regard. The Board properly found, therefore, on the facts of this case, that the January 23 contract was an Association contract and was binding on all the members of the Association. Accordingly, the Board's finding that the Association and its member-employers, except Heuser Iron and Trojan Steel, violated Section 8(a)(5) and (1) by refusing to sign and implement the January 23, 1976 agreement, should be affirmed.



VI. BY REFUSING TO REINSTATE THE STRIKING EMPLOYEES UPON THEIR UNCONDITIONAL APPLICATION, THE ASSOCIATION AND THE EMPLOYERS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT, AND BY DISCHARGING STRIKING EMPLOYEES, GREENPOINT ORNAMENTAL AND LONG ISLAND STEEL VIOLATED THOSE SAME SECTIONS

A. The Refusal of the Association and the Employers to Reinstall the Strikers

A strike in protest over an employer's violation of the Act is an "unfair labor practice strike" and the "striking employees do not lose their status and are entitled to reinstatement \* \* \* even if replacements for them have been made." Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278 (1956); N.L.R.B. v. Fitzgerald Mills Corp., supra, 313 F. 2d at 259; N.L.R.B. v. Milco, Inc., 388 F. 2d 133, 139 (C.A. 2, 1968). A strike begun in support of economic objectives may be converted to an unfair labor practice strike if the strikers subsequently begin to protest unfair labor practices. The strikers become unfair labor practice strikers on that date and are entitled, upon an unconditional offer to return to work, to immediate reinstatement if they have not been permanently replaced prior to the conversion. N.L.R.B. v. Johnson Sheet Metal, Inc., supra, 442 F. 2d at 1061; Philip Carey Mfg. Co., Miami Cabinet Div. v. N.L.R.B., 331 F. 2d 720, 729 (C.A. 6, 1964), cert. denied 379 U.S. 888. See N.L.R.B. v. Milco, Inc., supra, 388 F. 2d at 139.

The Board's finding that the strike here was converted to an unfair labor practice strike "at the latest, by January 16, 1976", (A. 2141) is fully supported by the record. As shown, supra, prior to that date the Association and the employers had engaged in extensive acts of illegal assistance to Local 810, violations of their bargaining obligations to Local 455, including the recognition of and execution of contracts with, Local 810, and threats of discharges as well as actual discharges. On January 16, the withdrawal notification was forwarded which presaged the refusal to bargain with Local 455 (A. 2/44). As there is no showing that the employees had been replaced prior to January 16, the striking employees were entitled to immediate reinstatement upon their unconditional application. Local 455's letters of February 27, March 1, and March 31, (supra, p. 27) clearly constitute on their face an unconditional request to return to work made by Local 455 on behalf of the striking employees. Thus, the failure of the Association and the employers, other than Heuser Iron and Trojan Steel, to reinstate the employees upon receiving the letters requesting reinstatement, constitutes a violation of Section 8(a)(3) and (1) of the Act.



B. Employee Discharges by  
Greenpoint Ornamental and  
Long Island Steel

But even before the request for reinstatement was made by Local 455, Greenpoint Ornamental and Long Island Steel had discharged their striking employees. As shown by the Statement, when striking employees were solicited by Greenpoint Ornamental President Geuther to return to work and they refused to do so until a contract was signed with Local 455, Geuther told them to look for other jobs. Also, when employee Matzell sought to return to work in January after the strike he was told he had no job. Similarly, Long Island Steel Vice President Steinfeld in February 1976, told employee Bender that he had signed with Local 810 and all the employees were out of a job. In early December, Long Island Steel President Davidson had told employee Frenna, upon his refusal to join Local 810, that Frenna had better look for another job. Both Greenpoint Ornamental and Long Island Steel signed contracts with Local 810.

The language used by the employers to the employees in each instance made clear that their discharge was effected. The discharges were violations of Section 8(a)(3) and (1) of the Act whether viewed as the discharge prior to replacement of employees engaged in the protected activity of an economic strike, or as the discharge of unfair labor practice strikers

(A. 2141) N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333, 345-346 (1938); Mastro Plastics Corp. v. N.L.R.B., supra, 350 U.S. at 278; N.L.R.B. v. Fitzgerald Mills Corp., supra, 313 F. 2d at 139. The Board's findings on these issues should be affirmed and its order enforced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment should be entered enforcing the Board's order in full.

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